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IN THE

Supreme Court of the United States

October Term, 1957

No. 412

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

—v.—

MILK DRIVERS AND DAIRY EMPLOYEES LOCAL UNIONS NOS. 338 AND 680, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO.
Respondents.

BRIEF ON BEHALF OF RESPONDENT, LOCAL 338, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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I.

Question Presented

The National Labor Relations Board's petition states that the question presented is as follows:

> "Whether union inducement of employees not to handle products, which would otherwise be proscribed as a secondary boycott by Section 8(b)(4)(A) and (B) of the National Labor Relations Act, as amended, is lawful because the employer and the union have agreed by contract that the employees may refuse to handle products received from a company with whom the union is directly engaged in a labor dispute." (p. 2).

This statement begs the question. It is believed that a more accurate statement of the question presented is:

> "Whether union inducement of employees to decline to perform work which is expressly excluded from the scope of the collective bargaining agreement entered into between the employer and the union may be held to constitute the inducement of a 'refusal in the course of their employment' under Section 8(b)(4) of the National Labor Relations Act, as amended."

II.

Argument

The National Labor Relations Board has previously held that work expressly excluded from the scope of a collective bargaining agreement cannot be the subject matter of a "refusal in the course of their employment" under Section 8(b)(4) of the Act.

At page 42 of the Board's brief filed in support of its petition for enforcement in the case of *Rabouin* v. *National Labor Relations Board*, 195 F. 2d 906, before the United States Court of Appeals for the Second Circuit, the Board stated:

> "In these circumstances, the refusal of the employees to handle Rabouin's freight was not a strike or a concerted refusal to work induced by the Union in violation of Section 8(b)(4)(A). A strike is the concerted withhholding of labor to gain the employer's accession to a demand which he is resisting. It is the employees' cessation of 'work at their own volition because of the failure of the employer to meet their demands.' In this case, however, the employees' refusal to handle Rabouin's goods was not in opposition to their employer. It was in keeping with the advance agreement of each employer, not repudiated but acquiesced in throughout. Thus, the indispensable prerequisite of a strike—a demand which the employer resists and for which the strike,

> is called—is missing. A refusal to work in which the employer concurs can hardly be called a strike against him."

The United States Court of Appeals in the *Rabouin* case sustained the Board's position and held:

> "The Union cannot have committed an unfair labor practice under this section in regard to those employers who refused to handle Rabouin's shipments under the terms of the area agreement provision relating to cargo shipped by struck employers. Consent in advance to honor a hot cargo clause is not the product of the union's 'forcing or requiring any employer * * * to cease doing business with any other person.' Section 8(b)(4)(A)." (195 F. 2d 906, 912)

Subsequent to the *Rabouin* case the Board had before it a situation similar to situation in the case at bar. *Pittsburgh Plate Glass Co.* (105 N. L. R. B. No. 120; June, 1953). In the *Pittsburgh* case the Board recognized that since the contract did not require employees to handle non-union goods, such work could not be correctly held to be "in the course of their employment". The Board stated:

> "Nor was their employees' refusal to handle Pittsburgh freight 'in the course * * * employment within the meaning of Section 8(b)(4)(A) for that employment as defined by the contracts excluded from the required job duties work on 'unfair goods'" (105 N. L. R. B. at p. 744).

It was clear in the *Pittsburgh Plate Glass* case that the employees had been induced to refuse to handle the goods by the Union. The Board found:

> "In view of the foregoing and on the record as a whole, we find that during the period involved herein, the Respondent engaged in, and by its instructions and other appeals, induced and encouraged the employees of various trucking carriers to engage in, a concerted refusal to handle Pittsburgh freight." (105 N. L. R. B. at p. 743).

The Board plainly concluded as follows:

> "While we find on the basis of the facts set forth below that the Respondent engaged in and induced employees of various trucking carriers to engage in a concerted refusal to handle Pittsburgh freight, we agree with the Trial Examiner that such action was a permissible exercise of contractual rights under the *Conway's Express* principle and hence no violation of the Act" (105 N. L. R. B. at p. 740).
>
> • • •
>
> "The Court of Appeals for the Second Circuit held in affirming the Board's decision in Conway's Express:
>
> > 'Consent in advance to honor a hot cargo clause is not the product of the union's "forcing or requiring any employer • • • to cease doing business with any other person."'
>
> The Board here reaffirms that principle. We therefore find that the Respondent did not violate Section 8(b)(4)(A) of the Act by causing the employees of the various trucking carriers to exercise their contractual privilege of declining to handle Pittsburgh freight. Accordingly, we shall dismiss the complaint" (105 N. L. R. B. at pp. 744, 745).

Thereafter in a series of cases, *McAllister Transfer, Inc.*, 110 N. L. R. B. No. 224 (December 16, 1954), *Sand Door and Plywood Co.*, 113 N. L. R. B. No. 123 (August 26, 1955), and *American Iron and Machine Works Co.*, 115 N. L. R. B. No. 121 (March 15, 1956), the Board, following a somewhat erratic course, proceeded to repudiate its former decisions and to defy the validity of the judicial determination of the United States Court of Appeals for the Second Circuit in the *Rabouin* case.

In the *McAllister* case two members of the Board took the position that so-called hot cargo provisions "are contrary to public policy and therefore no defense to the violation found herein". Differing, the then Chairman of the Board held that it was for Congress and not the Board to

legislate in such a manner as to outlaw collective bargaining agreements, and he concurred in the result solely upon the unique ground that the conduct in question became "a refusal" by the employees, under the Act, when the employer breached his contract and ordered his employees to perform the work.

Two members of the Board dissented, stating that they did not "consider it a proper function of the Board to disregard the sanctity of a valid contract" and that they could not countenance a conclusion that an employer by his own breach of contract should be permitted to cause a Union to be guilty of violating the Act.

Apparently troubled by the insecure reasoning of its stated position, the Board has since, in the *Sand Door* and *American Iron* cases, altered its rationale.

The Board now asserts that, no matter whether the employer observes or breaches his contract, it is unlawful for a Union to advise its members that they need not perform categories of service which are expressly excluded from the collective bargaining agreement. The Board states in its brief to the United States Court of Appeals for the Second Circuit in the case at bar (p. 37):

> "But, as the Ninth Circuit observed in enforcing the Board's *Sand Door* decision, *supra*, p. 27 (39 LRRM at 2433): 'An employer may well regain free to decide, as a matter of business policy, whether he will accede to a union's boycott demands, or, if he has already agreed to do so, whether he will fulfill his agreement. An entirely different situation, however, is presented * * * when it is sought to influence the employer's decision by a work stoppage of his employees.' Thus, although an employer may have agreed to a 'hot goods' clause, it does not follow that he will share the union's view as to whether a particular case is encompassed thereby."

To put the matter in plainer terms, the employer is told by the National Labor Relations Board, which the Act has instructed to promote and stabilize collective bargaining

(Sections 1, 7, and 301 of the Act), that he may breach his contract and thereby cause the Union to be guilty of violating the Act, or, if he prefers "as a matter of business policy" he may boycott the primary employer. At the same time the Union is told that it may not advise its members to enforce their collective bargaining agreement.

It is respectfully submitted that the Board's position is manifestly immoral, as well as lacking in legal foundation, and that the Court should deal with this matter summarily by a *per curiam* decision which would affirm the decision of the Court below. We join in a similar prayer made to this Court by the Respondent in case No. 273.

Conclusion

The opinion of the United States Court of Appeals for the Second Circuit concludes as follows:

> "The latest Board view fails to distinguish between instances of employer coercion and instances of employer consent. Chairman Farmer's position, while recognizing the need for such a distinction, ignores the statutory language requiring a 'strike' or 'concerted refusal in the course of their employment.' In the absence of a prior agreement, work to be done by employees is determined unilaterally by the employer; but where a collective agreement specifies the work to be done, that agreement defines the normal work of the employees and a 'strike' or 'refusal' must be a refusal to do that normal work. The employer obviously cannot impose additional work on the employees contrary to the agreement and then charge that their refusal to perform it constitutes an unfair practice. We see no difference in this respect between tasks exempted by the agreement because they are offensive to health or safety and tasks exempted because their performance is contrary to the interests of organized labor and, in this case, the local itself.

> "We also do not accept the argument that hot cargo clauses are against public policy. The advocates of this view ignore the statutory language to talk about 'secondary boycotts' and the undoubted Congressional dislike of them. Having assumed that refraining from work described in a hot cargo clause is a 'secondary boycott,' they frame the issue in terms of whether a hot cargo clause is a defense to a § 8(b)(4) unfair practice. We cannot agree with this characterization of the issue. There is no need for a 'defense' unless there has been a violation; and in determining the latter question we look to the statutory language, rather than the vague contempt 'secondary boycott,' about which the legislators sometimes talked, but which they did not write into the Act. For the reasons already given we hold that there is no 'forcing,' 'requiring,' 'concerted refusal in the course of their employment,' or 'strike,' and consequently no violation."

It is respectfully submitted that the decision of the United States Circuit Court of Appeals is soundly reasoned and should be affirmed.

Respectfully submitted,

SAMUEL J. COHEN,
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